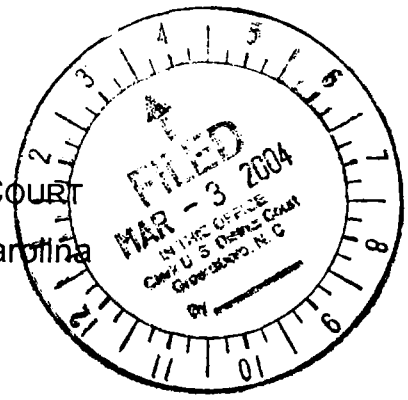

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UNITED STATES DISTRICT COURT
Middle District of North Carolina

BRENDA J. MINTER,
Plaintiff,

v.

FREEWAY FOOD, INC.,
Defendant.

1:03CV00882

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the court on Defendant's Motion To Compel Arbitration And For Stay Pending Arbitration (docket no. 5). Plaintiff has responded in opposition and Defendant has filed its reply. Since there has been no consent, *see* Letter from Chief Judge Tilley (docket no.8), I must deal with the motion by way of a recommended disposition. For the reasons discussed here, Defendant's motion should be retained under advisement until such time as a jury resolves the issue of whether an agreement to arbitrate was made.

I. Background

On September 8, 2003, Plaintiff Brenda J. Minter brought suit under 42 U.S.C. § 2000e-2(a) against her former employer, Defendant Freeway Foods, Inc., a corporation, for sexual harassment and discrimination. *See* Complaint attached to Notice of Removal (docket no. 1). Defendant is a franchisee and operator of a Waffle House restaurant in Greensboro where Plaintiff was employed from April 9,

2002, to February 21, 2003. *Id.* Plaintiff's complaint was filed in the Guilford County Superior Court and removed to this court on September 17, 2003. *Id.*

Defendant seeks arbitration of this sexual harassment and discrimination claim pursuant to 9 U.S.C. §§ 3 and 4 of the Federal Arbitration Act (FAA). Defendant relies upon an arbitration clause in the management application that Plaintiff signed when she applied for work. *See* Motion to Compel, etc.; *see also* Application (Ex. A) attached to declaration of Susan Richman (docket no. 7). At issue is whether or not there was agreement about this arbitration clause.

On October 31, 2003, Plaintiff filed a response brief and affidavit alleging that the parties had not agreed to arbitration of employment disputes and that she was fraudulently induced into signing the arbitration clause. *See* Brief (docket no. 11); Affidavit (docket no. 9). Plaintiff claimed that Defendant's Division Manager, Doug Kingston, who was present when she signed the application, promised that she would not be subject to the arbitration clause. *See* Affidavit, ¶ 3 ("Referring to the arbitration agreement, Mr. Kingston said, 'This does not apply to us and you would not be subject to arbitration because this is a Waffle House, Inc. application form.'"); *see also* Brief, pp. 1-2 (same). Doug Kingston denies having made this statement. *See* Declaration (docket no. 14) ("Ms. Minter never asked me any questions about the arbitration clause in her application and I did not tell her that the arbitration cause did not apply to her."). The circumstances surrounding the alleged creating of the arbitration agreement are further recounted in Plaintiff's affidavits (docket nos. 9, 15,

and 17) and declarations by parties associated with Defendant (docket nos. 7, 14, 16, and 18). Plaintiff has demanded a jury trial (docket no. 10) to determine the issue of fraudulent inducement.

II. Discussion

The FAA, 9 U.S.C. §§ 1-14, reflects a "liberal federal policy favoring arbitration agreements" as a means of settling disputes. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). To this end, a party to a lawsuit may petition the federal courts to enforce an arbitration agreement by compelling arbitration: "A Party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement . . . may [seek] an order directing that such arbitration proceed . . . ." 9 U.S.C. § 4. Generally, four issues must be considered when determining whether to stay proceedings and compel arbitration:

> (1) the existence of a dispute between the parities, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect, or refusal of the defendant to arbitrate the dispute.

Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-01 (4th Cir. 2002) (quoting *Whiteside v. Teltech Corp.*, 940 F.2d. 99, 102 (4th Cir. 1991)). If the court finds a valid arbitration agreement, and finds that the disputed issue is arbitrable, then the court must "stay the trial of the action until . . . arbitration has been [accomplished] in

accordance with the terms of the agreement." 9 U.S.C. § 3. If, on the other hand, "the making of the arbitration agreement be in issue, the court shall proceed . . . to the trial thereof." 9 U.S.C. § 4.

It is clear that when a question of fact arises as to the presence of an agreement to arbitrate, the issue may not be determined on the affidavits; rather a trial, either bench or jury, is required. *See Starr Elec. Co., Inc. v. Basic Constr. Co.*, 586 F. Supp. 964, 966 (M.D.N.C. 1982) (citing *Interocean Shipping Co. v. Nat'l Shipping & Trading Corp.*, 462 F.2d 673 (2nd Cir. 1972)). The opposing party may, as Plaintiff has done here, request a jury trial on the issue of whether or not the arbitration agreement is valid. *See* 9 U.S.C. § 4; *see also Starr Elec. Co., Inc.,* 586 F.Supp. at 964 (noting that the plaintiff would have been entitled to a jury trial had it been requested in a timely manner). A motion to compel arbitration, then, when challenged with a claim that an agreement to arbitrate never existed, becomes dependant upon the resolution of such a claim.

Decisions in other circuits have uniformly held that "[i]n the context of motions to compel arbitration brought under the Federal Arbitration Act (FAA), 9 U.S.C. § 4 (2000), courts apply a standard similar to that applicable to a motion for summary judgment." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2nd Cir. 2003); *see also Tinder v. Pinkerton Sec.*, 305 F.3d 728, 735 (7th Cir. 2002); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n.9 (3rd Cir. 1980); *Brown v. Dorsey & Whitney, LLP*, 267 F. Supp.2d 61, 66-67 (D.D.C. 2003). Accordingly, the summary

judgment standard will be applied on this issue of whether an arbitration agreement was ever formed. Under the settled standard, summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). To withstand summary judgment, Plaintiff "must show genuine factual issues regarding her allegations about the making of the arbitration agreement, such that a jury could find no agreement." *Topf v. Warnaco*, 942 F. Supp. 762, 767 (D.Conn. 1996).

In a dispute over the existence of a valid arbitration agreement, a plaintiff's allegations must be assessed in light of the contract principles of the law of the state which governs the contract. *See First Options of Chicago, Inc . v. Kaplan*, 514 U.S. 938, 944 (1995) (citing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995); *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-476 (1989); *Perry v. Thomas,* 482 U.S. 483, 492-493, n. 9 (1987); G. Wilner, 1 Domke on Commercial Arbitration §§ 4:04, p. 15 (rev. ed. Supp.1993)). In this case, North Carolina law will be applied. North Carolina law clearly demonstrates that before parties can be compelled to settle a dispute by arbitration, there must exist a valid agreement to arbitrate. *See* N.C. GEN. STAT. § 1-567.2; *see also Routh v. Snap-On Tools Corp.*, 108 N.C. App 268, 271, 423 S.E.2d 791, 794 (1992). Likewise, North Carolina requires the party seeking to compel arbitration to demonstrate that both parties mutually agreed to arbitrate their disputes. *Routh,* 108 N.C. App at 271, 423 S.E.2d at 794 (citing *Southern Spindle and Flyer Co,* Inc. *v.*

Milliken & Co., 53 N.C. App. 785, 281 S.E.2d 734 (1981)). Specifically, because Plaintiff claims that she was lied to when she signed the application which contained an arbitration clause, the law governing fraud in the inducement of a contract must be examined.

Under North Carolina law, fraud in the inducement is an established defense to enforceability of the contract itself. "It is well-settled that a contract or any other instrument is vitiated by a proven allegation that the instrument in question was procured through fraud." *Matthews v. Prince*, 90 N.C. App. 541, 546, 369 S.E.2d 116 (1988) (citing *Cowart v. Honeycutt,* 257 N.C. 136, 125 S.E.2d 382 (1962)). In order to establish a prima facie case of fraud, Plaintiff must show:

> (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that when he made it defendant knew it was false *or made it recklessly without any knowledge of its truth and as a positive assertion;* (d) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (e) that the plaintiff reasonably relied upon the representation and acted upon it; and (f) that the plaintiff suffered injury.

Bolick v. Townsend Co., 94 N.C. App. 650, 652, 381 S.E.2d 175, 176 (1989) (citing *Myers and Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988) (quoting *Odom v. Little Rock and I-85 Corp.,* 299 N.C. 86, 261 S.E.2d 99 (1980) (emphasis in original))).

Plaintiff has denied, from the beginning, the existence of the agreement to arbitrate and she has tendered affidavits and other documents to support the claims

that she was lied to by someone who should have been in a position to know the truth when she was told that she would not be bound by the arbitration agreement, and that she only signed the application believing that to be the case. This is sufficient under the summary judgment standard to raise a question of fact as to the presence of an agreement to arbitrate in light of North Carolina's fraud in the inducement defense. *See Starr Elec. Co., Inc.*, 586 F. Supp. at 967 (finding that a question of fact was sufficiently raised when the plaintiff "denied from the start the existence of the agreement to arbitrate and tenders as proof an affidavit in which an account is given of the removal of an arbitration clause from the standard form contract . . . ."). Therefore, Plaintiff should be granted a trial on the issue.

III. Conclusion

For the reasons discussed above, it is RECOMMENDED that Defendant's Motion To Compel Arbitration And For Stay Pending Arbitration (docket no. 5) be retained under advisement until such time as a jury resolves the issue of whether an agreement to arbitrate was made.

Wallace W. Dixon
United States Magistrate Judge

March 3 , 2004